

FILED BY CLERK

MAY 28 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NAIMA HANA SIMI,)	
)	2 CA-CV 2010-0009
Petitioner/Appellee,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
STEPHEN MATTHEW SIMI,)	Rule 28, Rules of Civil
)	Appellate Procedure
Respondent/Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20010792

Honorable Deborah Ward, Judge

REMANDED

Kahlidi & Ferrier, P.L.L.C.
By Robert M. Ferrier

Tucson
Attorneys for
Respondent/Appellant

B R A M M E R, Judge.

¶1 After the dissolution of their marriage in 2001, appellant Stephen Simi and his former wife Naima Simi shared joint legal and physical custody of their two children. Stephen appeals from the trial court's order denying his request for sole custody and continuing and modifying the parents' joint legal custody of the children. Stephen asserts

the court abused its discretion by failing to make the findings required by A.R.S. §§ 25-403 and 25-403.01.¹ We remand the case to the trial court for it to make the required findings.

Factual and Procedural Background

¶2 Stephen and Naima were divorced on December 20, 2001. In the decree of dissolution, the trial court adopted the parties' agreement regarding custody, visitation, and support of their children. The court determined the agreement's provision for joint legal and physical custody was "in the children's best interest pursuant to A.R.S. §§ 25-402, 403."

¶3 In January 2009, Naima filed a petition to modify the child custody agreement, requesting that she be awarded sole care, control, and custody of the children. Stephen opposed Naima's petition and asked that he be awarded sole legal custody and primary physical custody. The court ordered a hearing on the issues.

¶4 In support of her request for sole custody, Naima referred in her pretrial statement to Stephen's alleged conduct in "continuing to violate the parenting plan, Parenting Coordinator's recommendations, and Court Orders, as well as his refusal to effectively co-parent." In support of his mirroring request, Stephen cited Naima's alleged refusal to co-parent, inability to maintain a job or stable residence, previous relocation attempts, and actions "involv[ing]" the children in the litigation process. He further

¹Naima has failed to file an answering brief. Although we are not required to do so, we may treat an appellee's failure to respond as a confession of error. *See In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 2, 38 P.3d 1189, 1190 (App. 2002). We decline to do so here because the children's best interests are involved. *See id.*

expressed concern that, if the trial court were to grant Naima's request to permit the children to spend summers with her in Morocco, a non-signatory to the Hague Convention, Naima would "simply refuse to return the children upon the completion of any extra-territorial visit."

¶5 After a hearing in September 2009, the trial court awarded Stephen primary physical custody of the children because of Naima's intent to relocate to Morocco, her country of origin. It ordered that the children remain in Tucson in their present schools, and it took under advisement the issue of legal custody and parenting time. In an order dated September 25, 2009, the court ruled on those issues.

¶6 In the September 25 order, rejecting Stephen's concerns that Naima would ignore the court's custody orders and refuse to return the children, the trial court ordered that the children spend their summers with Naima "in Europe and/or Morocco." It further modified the existing parenting schedule by adopting Naima's proposed parenting plan. The court made no further findings regarding those modifications.

¶7 The trial court ordered that Stephen and Naima continue to have joint legal custody of the children, but it modified their rights regarding decisions respecting the children's religious upbringing, health, education, and other issues "significantly affecting the children's lives." With respect to long-term health decisions and other significant issues, the court ordered that Stephen and Naima consult each other, but if they could not reach an agreement, that Naima would have final decision-making responsibility. The court found, in support of its modifications, that Stephen and Naima

had failed to co-parent successfully. It further noted its displeasure with Stephen's conduct, stating:

[Stephen's] demeanor during his testimony to the Court at the last hearing was very disturbing. His behavior over the course of the past post-decree proceedings demonstrated an unhealthy obsession to exercise control over these children. His overly litigious behavior has cost this family both emotionally and financially. This court has been involved in legal disputes concerning parenting issues since the children were approximately four years of age. They are now thirteen years old. It is well past time that [Stephen] should have been able to make the adjustment to co-parenting yet he seems emotionally unable to do this.

This appeal followed.²

Discussion

¶8 Stephen argues the trial court failed to make the findings required by §§ 25-403 and 25-403.01 in support of its custody order. We review a trial court's custody determination for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003). Pursuant to § 25-403(A), when determining custody "either originally or on petition for modification," a trial court, "in accordance with the best interests of the child," must consider "all relevant factors, including:"

1. The wishes of the child's parent or parents as to custody.
2. The wishes of the child as to the custodian.
3. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.

²After filing his notice of appeal, Stephen filed with the trial court a motion for reconsideration, which the court denied. Filing the notice of appeal, however, divested the court of jurisdiction to consider the motion. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 380-81, 868 P.2d 958, 963-64 (App. 1993).

4. The child's adjustment to home, school and community.
5. The mental and physical health of all individuals involved.
6. Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.
7. Whether one parent, both parents or neither parent has provided primary care of the child.
8. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.
9. Whether a parent has complied with chapter 3, article 5 of this title.
10. Whether either parent was convicted of an act of false reporting of child abuse or neglect under [A.R.S.] § 13-2907.02.
11. Whether there has been domestic violence or child abuse as defined in § 25-403.03.

¶9 In a contested custody case, like the one before us, a trial court is required to “make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.” § 25-403(B). Further, a court may only order joint custody “over the objection of one of the parents” if the court also makes “specific written findings of why the order is in the child’s best interests” and considers four factors in addition to those enumerated in § 25-403(A): “[t]he agreement or lack of an agreement by the parents regarding joint custody,” “[w]hether a parent’s lack of agreement is unreasonable or is influenced by an issue not related to the best interests of the child,” “[t]he past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint custody,” and “[w]hether the joint custody arrangement is logistically possible.” § 25-403.01(B).

¶10 A trial court is “statutorily required to document” its weighing of these factors. *Hart v. Hart*, 220 Ariz. 183, ¶ 13, 204 P.3d 441, 444-45 (App. 2009). Its failure to do so “can constitute an abuse of discretion requiring reversal and a remand.” *Id.* ¶ 9; *see Hurd v. Hurd*, 223 Ariz. 48, ¶ 11, 219 P.3d 258, 261 (App. 2009) (“It is an abuse of discretion for the family court to fail to make the requisite findings pursuant to § 25-403.”); *Owen*, 206 Ariz. 418, ¶¶ 9, 11-12, 79 P.3d at 670-71 (holding court abused discretion by changing custody arrangements without making findings on record); *Downs v. Scheffler*, 206 Ariz. 496, ¶ 19, 80 P.3d 775, 780 (App. 2003) (same); *In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 5, 38 P.3d 1189, 1191 (App. 2002) (same).

¶11 A trial court’s compliance with this statutory requirement facilitates appellate review, as we then can discern which factors the court relied on and ensure the court did not give inappropriate weight to a single factor “to the exclusion of other relevant considerations.” *Owen*, 206 Ariz. 418, ¶ 12, 79 P.3d at 670-71. Moreover, as Division One of this court noted in *Reid v. Reid*, 222 Ariz. 204, ¶ 18, 213 P.3d 353, 358 (App. 2009), because a trial court has continuing jurisdiction to amend or modify custody determinations, “[t]he rationale for this requirement is not simply to aid appellate review[,] . . . but also to provide the family court with a necessary ‘baseline’ against which to measure any future petitions by either party based on ‘changed circumstances.’”

¶12 The trial court’s order here contained findings pertaining to some, but not all, of the fifteen statutorily required factors. For example, nothing in the record suggests the court considered the children’s wishes regarding custody, the children’s relationship with either parent, the extent of the care provided by each parent, or the children’s

adjustment to their home, school, and community. *See* § 25-403(A)(2)-(4), (7). And, although the court found the parents had “failed in co-parenting these children” and observed that it found Stephen’s behavior particularly troubling, it did not explain how these findings supported its implicit conclusion that continuing the parents’ joint custody was in the children’s best interests. Therefore, we remand the case to the trial court with directions to make the findings required under §§ 25-403 and 25-403.01 and to provide the reasons its decision is in the best interests of the children.³

Disposition

¶13 We remand the case to the trial court for further proceedings consistent with this decision.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

³Because Stephen does not ask us to vacate the trial court’s custody order, only to remand for further findings, and because the court’s order modified but nonetheless continued the existing joint custody, we decline to vacate the custody order. *Cf. Hart*, 220 Ariz. 183, ¶ 14, 204 P.3d at 445 (vacating order, “rather than simply remand[ing] for additional findings, because of the significant number of factors not addressed”).